



STATE OF NEW JERSEY

Board of Public Utilities

Two Gateway Center

Newark, NJ 07102

www.bpu.state.nj.us

IN THE MATTER OF THE JOINT)
PETITION OF SBC COMMUNICATIONS INC.)
AND AT&T CORP, TOGETHER WITH)
ITS CERTIFICATED SUBSIDIARIES FOR)
APPROVAL OF MERGER)

TELECOMMUNICATIONS

**PROVISIONAL ORDER ON
MOTION FOR INTERVENTION**

BPU DOCKET NO. TM05020168

(SERVICE LIST ATTACHED)

BEFORE COMMISSIONER FREDERICK F. BUTLER:

The New Jersey Board of Public Utilities ("Board"), pursuant to N.J.S.A. 48:2-1 et seq., has been granted general supervision and regulation of and jurisdiction and control over all public utility systems which operate within the State of New Jersey, including telephone companies such as AT&T Communications NJ, L.P. ("AT&T"). Moreover, the Board has specifically been granted the authority to review certain mergers and acquisitions by and of such public utilities, pursuant to N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10. Pursuant to said authority, the within matter was initially opened to the Board upon the joint filing of a request by AT&T, together with its certified subsidiaries, and SBC Communications Inc. ("SBC", jointly "petitioners") for Board approval of their proposed merger. In connection with this matter the Board issued a Pre-Hearing Order on April 20, 2005, which set forth a schedule for, *inter alia*, discovery, motions to intervene, and public and evidentiary hearings.

At its April 6, 2005 Agenda Meeting, the Board ordered that a Pre-Hearing Conference be convened in this matter on April 14, 2005. Qwest Communications Corporation ("Qwest") was among the telecommunications carriers that were notified of this upcoming conference. On April 14, the conference took place without the participation of Qwest. The attending parties reached a consensus regarding the key issues in this matter, including the schedule for, *inter alia*, discovery, motions to intervene, the filing of Initial Statements or Pre-Filed testimony, and public and evidentiary hearings. The Board issued a Pre-Hearing Order on April 20, 2005, which set forth the aforementioned schedule. A copy of the Pre-Hearing Order was sent to Qwest. Pursuant to this schedule, the deadline for moving to intervene in the proceeding was April 27, 2005.

Qwest filed a motion seeking the right to intervene on May 4, 2005. In support of its application for intervention, Qwest filed an "Initial Statement" and affidavit in support thereof, as well as a copy of a Petition to Deny recently filed with the Federal Communications Commission ("FCC") in connection with the FCC's review of the SBC/AT&T merger. Qwest noted that it is an entity authorized to provide telecommunications services in the State of New Jersey, including facilities-based and resale local exchange, interexchange and operator services. Qwest alleged that this proceeding will have a substantial, specific and direct impact upon it as a competitor of petitioners. In a separate attached statement, Qwest articulated the harms that will allegedly result from the merger. These include the possible cessation of AT&T's role as a main competitor to Incumbent Local Exchange Carriers and provider of wholesale local exchange facilities, as well as a negative impact on the state of competition in New Jersey. Qwest's filing included a certification from Jeffrey P. Wirtzfeld, its Regional Director with responsibility for New Jersey, certifying that the facts set forth in its petition are true and accurate to the best of his knowledge and belief.

Qwest also asserted that the Board's procedural schedule is too abbreviated to accommodate the level of investigation necessary to address these issues. Qwest "suspects that additional time may be needed to conduct a more complete investigation." (Qwest Initial Statement at 4). Qwest further acknowledged that it did not timely file its motion to intervene, but contends that it needed additional time to determine how to respond to this matter, and that no party would be prejudiced by the one-week delay in its filing. Qwest asserted that no other party currently participating in the proceeding can adequately represent its interests, and that its participation will add measurably and constructively to the record in this proceeding.

On May 11, 2005, petitioners filed written opposition to Qwest's motion. Petitioners argued that Qwest's motion should be denied because it failed to demonstrate, with any particularity, the nature of Qwest's interests in New Jersey, or how such interests would be substantially, specifically and directly affected by this proceeding. Petitioners further argued that Qwest's claims are undermined by its failure to participate in any important industry-wide telecommunications competition proceeding before the Board in the recent past. Petitioners stated that the Counsel Statement filed with Qwest's motion did not constitute proper pre-filed testimony as contemplated by all parties and the Board in its Pre-Hearing Order. Petitioners contended that, should Qwest be allowed to intervene as a full party, its failure to file appropriate testimony negated petitioners' ability to file effective discovery requests and reply testimony. Petitioners also contended that permitting Qwest to reply to their testimony would be unfair and violative of petitioners' due process rights if Qwest was also insulated from challenges to its non-existent initial testimony.

On May 16, 2005, Qwest filed a reply brief, in which it reiterated that it competes with AT&T for retail business and is a wholesale customer of AT&T in New Jersey. It further noted that no other CLEC is a party or has sought to intervene in this matter. Qwest further stated that it would not seek to change the schedule set forth in the Board's Pre-Hearing Order, or cause any delay whatsoever.

On May 24, 2005, Qwest informed the Board that it was converting its motion for intervention as a full party to a request for participant status pursuant to N.J.A.C. 1:1-16.6(c). Qwest withdrew its recently filed request for confidential versions of petitioners' pre-filed testimony and its demand for responses to interrogatories, submitted to petitioners on May 12, 2005. Qwest also withdrew its Initial Statement, filed with its motion on May 4, 2005. Petitioners did not object to Qwest's revised motion for participant status (while not agreeing with Qwest's positions in this proceeding and reserving any rights as to their own current or future positions therein). Neither

Board Staff nor the Ratepayer Advocate filed any opposition to Qwest's original or revised motion.

DISCUSSION

Pursuant to N.J.A.C. 1:1-12.4(a), motions filed in administrative proceedings shall be supported by affidavits for facts relied upon which are not of record or which are not subject to official notice. A Board order must be supported by evidence before the Board. N.J.S.A. 48:2-46.

Motions for intervention are controlled by the standards set forth in N.J.A.C. 1:1-16.3. In the absence of statutory permission for intervenor status, any person or entity who will be "substantially, specifically and directly affected by the outcome of a contested case" may seek to intervene as a full party to the proceeding. N.J.A.C. 1:1-16.1(a). Pursuant to N.J.A.C. 1:1-16.3(a), adjudication of such a motion requires an analysis of the "nature and extent of the movant's interest" in the matter, whether or not the "movant's interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case," "the prospect of confusion or undue delay arising from the movant's inclusion," and other appropriate matters. Every motion for leave to intervene also acts, in the alternative, as a motion for permission to participate. N.J.A.C. 1:1-16.5. Participation provides for a lesser level of involvement in the matter, but only requires a showing of a "significant interest" on the part of the moving party. N.J.A.C. 1:1-16.6(a). Participation is limited to oral argument, filing a statement or brief, and filing exceptions to an initial decision with the agency head. N.J.A.C. 1:1-16.6(c).

Here, Qwest does not have or assert a statutory right to participate, so must instead present a showing that intervention, or, in the alternative, participation is proper. As per its revised motion, Qwest must demonstrate that it has a "significant" interest in the outcome of this proceeding. The actual extent to which Qwest provides telecommunications services in New Jersey, and the nature and location of those services, is unclear from Qwest's motion. However, without making any determination as to the validity of Qwest's assertions, it is clear that Qwest believes that the results of this proceeding will potentially have a significant impact on its competitive position in New Jersey's telecommunications market. Given the size and competitive reach of AT&T and SBC, I find this assumption to be reasonable on its face and supportive of the standard for participant status set forth in N.J.A.C. 1:1-16.6. I also find that Qwest's participation will constructively add to the record, since no competitive local exchange carrier aside from AT&T is currently a party in this matter.

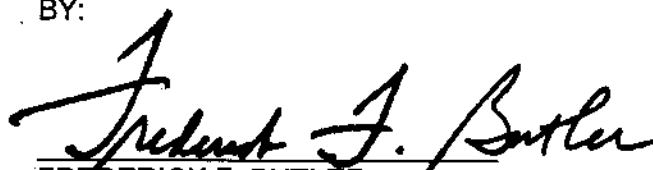
Furthermore, at this early stage of the proceeding, no party can claim to be unfairly prejudiced by Qwest's entrance as a participant, especially since Qwest will be bound by all procedural deadlines set forth in the Pre-Hearing Order, irrespective of whether any such deadlines have expired. Pursuant to this order and N.J.A.C. 1:1-16.6(c), Qwest may file brief in this matter (oral argument and the filing of exceptions to an initial decision being inapplicable to this proceeding before a Board Commissioner). Qwest will not be permitted to participate in discovery or cross examination.

Accordingly, I **HEREBY FIND** that Qwest has met the requirements for participant status under N.J.A.C. 1:1-16.6 et seq., and therefore **ORDER** that upon review of the aforementioned motion, as amended on May 24, 2005, said motion is **HEREBY GRANTED**.

This provisional ruling is subject to ratification or other alteration by the Board as it deems appropriate during the proceedings in this matter.

DATED: 5/25/05

BY:

A handwritten signature in cursive script, reading "Frederick F. Butler". The signature is written in black ink and is positioned above the printed name and title.

FREDERICK F. BUTLER
COMMISSIONER